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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE CAPACITORS ANTITRUST
LITIGATION

) MDL No. 2801

) Master File No.: 3:17-md-02801-JD

This Document Relates to:

) **CERTAIN DEFENDANTS' NOTICE**
) **OF MOTION AND MOTION TO**
) **EXCLUDE TESTIMONY OF DR.**
) **LESLIE M. MARX**

Case Nos.: 3:14-cv-03264-JD,
3:17-cv-03472-JD,
3:17-cv-07046-JD,
3:17-cv-07047-JD,
3:18-cv-02657-JD.

) **ORAL ARGUMENT REQUESTED**

) Date: August 29, 2019

) Time: 10:00 a.m.

) Judge: Hon. James Donato

) Location: Courtroom 11

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on August 29, 2019 at 10:00 a.m., or as soon thereafter as the matter may be heard, the undersigned Defendants¹ will and hereby do move the Court, under Rules 104(a) and 702 of the Federal Rules of Evidence, to exclude the testimony of Dr. Leslie M. Marx, expert for the five Direct Action Purchaser Plaintiffs (“DAPs”), because that testimony is unreliable as defined by those rules and the interpretation of them as specified by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

This motion is based upon this Notice of Motion; the accompanying Memorandum of Points and Authorities; the declaration of Dr. Laila Haider (“Haider Decl.”) and exhibits thereto; the declaration of Dr. Stephen Prowse (“Prowse Decl.”) and the exhibits thereto; and the declaration of Justin A. Cohen (“Cohen Decl.”) and the exhibits thereto, all filed herewith and incorporated by reference herein; the complete files and records in these consolidated actions; oral argument of counsel; and such other and further matters as the Court may consider.

STATEMENT OF ISSUE TO BE DECIDED

A. Whether Dr. Marx’s econometric model, which forms the entire basis for her damages conclusions, is unreliable and therefore inadmissible under FED. R. EVID. 702.

B. Whether Dr. Marx’s testimony concerning the “reasonableness” or “plausibility” of the DAPs’ claim of the existence of a cartel among capacitor manufacturers should be excluded because it is unsupported by the evidence, outside the scope of her expertise, and adds nothing to the record.

¹ “Defendants” are AVX Corporation, Elna Co., Ltd., Elna America, Inc., Hitachi Chemical Co., Ltd., Hitachi AIC Inc., Hitachi Chemical Co. America, Ltd., Holy Stone Enterprise Co., Ltd., Holy Stone Polytech Co. Ltd., Vishay Polytech Co., Ltd., Milestone Global Technology, Inc. (d/b/a HolyStone International), Matsuo Electric Co., Ltd., Nichicon Corporation, Nichicon (America) Corporation, Nippon Chemi-Con Corporation, United Chemi-Con, Inc., Rubycon Corporation, and Rubycon America Inc. The Hitachi Chemical, Holy Stone, Nichicon, and Rubycon Defendants join this motion only as to AASI, Avnet, and Benchmark. AVX joins this motion only as to AASI, Benchmark, and Flextronics.

1 DATED: June 14, 2019

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Pursuant to Local Rule 5-1(i)(3), the filer attests that concurrence
in the filing of this document has been obtained from each of the above signatories.

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MEMORANDUM OF POINTS AND AUTHORITY

Dr. Leslie M. Marx is the damages expert for five opt-out plaintiffs: AASI, Avnet, Benchmark, Arrow, and Flextronics (collectively, the “Direct Action Plaintiffs” or “DAPs”). The undersigned Defendants move to exclude the testimony of Dr. Marx under Rule 702 of the Federal Rules of Evidence. The basis of the motion is that each of Dr. Marx’s econometric models (one for each type of capacitor dielectric) – the entire basis for her opinion – is unreliable and inadmissible under Rule 702 and the Supreme Court’s decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and its progeny.

Each of Dr. Marx’s econometric models depends entirely on what Dr. Marx has described as an “annual cartel indicator variable.” For unexplained reasons, Dr. Marx has arbitrarily chosen to start the variable in January of each year and then have the variable “reset” the following January. But starting this variable in January has no meaningful nexus to the facts. Despite this, the starting month has an outcome determinative impact on Dr. Marx’s results. Indeed, when Dr. Marx’s models are tested by changing the starting month for which the annual cartel indicator variable is defined, the models produce absurd outcomes – including a “negative infinity” overcharge – demonstrating that the models are arbitrarily specified and hence not reliable. The fact the Dr. Marx avoids absurd results only by marking an arbitrary decision in specifying the starting month for her annual cartel variable alone requires exclusion under *Daubert*.

In addition, Dr. Marx’s model must be excluded because (1) it is not generally accepted in the professional economics community and has not been subjected to peer review or publication; and (2) the pattern of percentage overcharges her model generates bears no relation to any of the allegations of how the cartel impacted prices. Finally, Dr. Marx includes impermissible testimony in Section III of her report concerning the “reasonableness” or “plausibility” of the DAPs’ claim of the existence of a cartel among capacitor manufacturers. This testimony should be excluded because it is nothing more than quotes from or citations to documentary evidence from public sources or produced by the parties in discovery.

For the reasons that follow, Defendants respectfully request the Court exclude Dr. Marx's purported expert testimony.

I. DR. MARX'S MODEL

Dr. Marx has constructed three econometric models, one for each dielectric, namely aluminum, tantalum, and film, to assess purported overcharges in prices paid by DAPs for their capacitor purchases from the defendants. Haider Decl. ¶ 4. Each of these models is expressed as an equation, which is referred to as a "regression equation."²

Although this motion does not require a deep dive into mathematics or statistics, it is necessary to define a few terms to discuss Dr. Marx's model:

- Dependent Variable: The variable on the left-hand side of the regression equation is the "dependent" variable. It is called the dependent variable because the model assumes changes in this variable depend only upon changes in the variables on the right-hand side of the equation. In Dr. Marx's model, and as explained in more detail in connection with the "Monthly Fisher Price Index," the dependent variable is an aggregate measure of the prices of certain capacitors.

- Explanatory Variables: The variables on the right-hand side of the regression equation are called "explanatory" variables, because they are intended to explain changes in the dependent variable on the left-hand side of the regression equation. Most of the explanatory variables in Dr. Marx's model relate to the supply of and demand for capacitors.

- Annual Cartel Indicator Variable: Dr. Marx's explanatory variables also include an "annual cartel indicator variable." Unlike other explanatory variables in the model, the annual cartel indicator variable is not related to the supply of or demand for capacitors. Rather, it is a special variable designed to measure the impact of the assumed conspiracy. As discussed in section II-A-1 below, Dr. Marx has 14 annual cartel indicator variables.

- Monthly Fisher Price Index: As the dependent variable on the left-hand side of the regression equation, Dr. Marx has created a monthly "Fisher price index." Cohen Decl., Ex. A,

² Because the methodology for each of the models is the same, Cohen Decl., Ex. A ¶¶ 97-149, we will, for ease of reference, refer to a single (regression) equation or single model, even though there is a separate (regression) equation for each type of dielectric.

pp. 49-50, ¶ 99. The Fisher price index generated each month represents an aggregate measure of the cost of a hypothetical shopping cart filled with thousands of capacitors. There are three separate shopping carts – one shopping cart for each of the three capacitor dielectric types.³ Dr. Marx included a given transaction in her shopping cart for a given month only if the *same capacitor was sold to the same customer in consecutive months*; all other transactions were excluded. Cohen Decl., Ex. A, pp. 49-50, ¶ 99; Ex. B at 30:5-31:9. Dr. Marx also did not limit her shopping cart, and hence, her analysis to capacitors purchased by the DAPs; her shopping cart includes capacitors sold by defendants to *all* purchasers in the United States. Crucially, capacitors purchased by the DAPs constitute only about █% of the capacitors in the shopping cart. Cohen Decl., Ex. B at 21:22-22:9, 45:11-25. Dr. Marx then uses her Fisher price index methodology to measure the cost of the shopping cart on a monthly basis, taking into account changes over time as to which capacitors are in the shopping cart and at what prices. Cohen Decl., Ex. A, pp. 49-50, ¶ 99.

For ease of tracking changes over time, which is what price indices do, the value of each shopping cart is expressed not as a dollar amount but as a simple number – the “index number.” The starting index number for each shopping cart is 100, which is for the month of October 2001. The index number changes each month, depending on what happens to prices in the hypothetical shopping cart and the methodology used to construct the index. For each of the three shopping carts, Dr. Marx computes a Fisher price index number for 171 consecutive months – from October 2001 through December 2015. Each of these 171 monthly index numbers is a data point on the left-hand side of the regression equation.

- Conduct Period and Benchmark Period: These are terms that Dr. Marx herself defines. Cohen Decl., Ex. A, p. 53, ¶¶ 112-14. The Conduct Period is the period of 147 months from November 2001 through January 2014. This is the period for which Dr. Marx assumes a cartel was in effect. The Benchmark Period is for the next 23 months (February 2014 – December 2015). Dr. Marx assumes that no cartel was in effect during the Benchmark Period,

³ Given that the methodology for each type of capacitor is identical, however, we will sometimes refer to a single shopping cart for ease of reference, just as we sometimes will refer to a single model or a single regression equation.

and that, therefore, prices during this period were not inflated above competitive levels due to the alleged cartel.

- Monthly Overcharge Percentages: Using the statistical techniques described in her Report, Dr. Marx comes up with a series of 147 monthly overcharge percentages for each dielectric type (*i.e.*, one overcharge percentage for each month of the Conduct Period). Cohen Decl., Ex. A, pp. 58-59, ¶ 139, Figures 11, 12, and 13. Using Dr. Marx's model for aluminum capacitors for example, the model comes up with an overcharge percentage for a given month in the Conduct Period and assumes that this overcharge percentage applies to all aluminum capacitors sold by all defendants to the DAPs in the United States in that month, even though their purchases constitute only about 11% of the transactions the model is using. The monthly overcharge percentage for that month is then multiplied by the purchases of each DAP for that month to come up with a dollar amount of purported overcharges paid by each DAP for that month. That same process – multiplying the percentage overcharge for a given month by purchases by each DAP for that month – applies to all 147 months in the Conduct Period. Cohen Decl., Ex. A, p. 64, ¶ 150.⁴

II. ARGUMENT

A. Based on the *Daubert* indicia of reliability, the overcharge model of Dr. Marx is unreliable and hence inadmissible.

Federal Rule of Evidence 702 requires that unreliable expert testimony be excluded. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993); *Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457, 463 (9th Cir. 2014). In *Daubert*, the Supreme Court identified the several factors for assessing whether an expert's evidence is reliable, including:

- Whether standards exist for controlling the technique's operation;
 - Whether the methodology is generally accepted within the scientific community;
- and
- Whether the technique or theory has been subjected to peer review or publication.

⁴ The monthly dollar amounts of overcharges each DAP paid, according to the model, are set forth in Appendix E to Dr. Marx's Report. Cohen Decl., Ex. A.

509 U.S. at 593-94. Each of these indicators of reliability renders Dr. Marx's econometric models—her regression equations—completely unreliable and thus, inadmissible.

1. The results of Dr. Marx's model depend on her arbitrary decision as to which there is no controlling standard.

The linchpin of admissibility under *Daubert* and Rule 702 is that the expert's analysis be reliable. Expert testimony that is “connected to existing data only by the *ipse dixit* of the expert” is unreliable and must be excluded. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146-47 (1997). Here, Dr. Marx's model is inherently unreliable because an objective standard for controlling its operation does not exist. Specifically, Dr. Marx's definition (or “specification”) of her annual cartel indicator variable, corresponding to a series of 12-month periods during the Conduct Period, requires her to choose a starting month for which to define the annual period. Haider Decl. ¶ 6. But her choice to use January as the starting month is completely arbitrary in this context, given that her Conduct Period begins in November 2001.⁵ Nevertheless, that arbitrary decision drives the results her model produces. Indeed, when the sensitivity of her model is tested by using other months as the starting month for defining the annual cartel indicator variable, her model produces results that are either nonsensical or contrary to her ultimate conclusions. In other words, her model depends entirely on an arbitrary decision as to which there is no controlling standard and therefore should be excluded.

Her arbitrary decision at issue here is simple: choose a month that is going to be the starting month for a series of 12-month periods. Dr. Marx's model requires a choice of the starting month because her Fisher price index on the left-hand side of the equation is a *monthly* index, but the cartel indicator variables on the right-hand side are *annual* variables. Therefore, it is necessary to specify the starting month to define the 12-month period covered by each of her *annual* cartel indicator variables.

⁵ For the year 2001, Dr. Marx's “annual” cartel indicator variable represents only two months – November and December. She arbitrarily reset the variable to January for 2002 and each subsequent years through 2013. For 2014, the “annual” cartel indicator variable only represents one month, January. Her Benchmark Period begins in February 2014. Haider Decl. ¶ 6 n.7.

So, what should the starting month be? One could make a case for November, since the Conduct Period in Dr. Marx's model begins in November 2001. One could also make a case for February, given that Dr. Marx's Benchmark Period begins in February 2014. One could also make a case for April, the month that most Japanese corporations begin their fiscal year. There is no "right" answer for what month to choose as the starting month, and there is no standard by which to decide the starting month.

The absence of a controlling standard by which to choose the starting month would not matter if the results of the model did not depend entirely on the chosen starting month. But here, her choice of the starting month for the annual cartel indicator variable is not just important. It is entirely dispositive as to the estimated overcharge percentages calculated by Dr. Marx. Simply put, Dr. Marx's methodology is akin to throwing a dart at a board divided into twelve sections (one for each month), and where the dart lands will determine the overcharge percentage. The following chart shows this dart board effect for Dr. Marx's model for aluminum capacitors. The "Starting Month" column refers to which month is selected to be the starting month for the specification of the annual cartel indicator variable. The "Percentage Overcharge" column is the average of the 147 monthly overcharge percentages the model generates based solely on the specification of the starting month for the annual cartel indicator variable.

<u>Starting Month</u>	<u>Percent Overcharge</u>
[a]	[b]
January (Dr. Marx's Starting Month)	13.5%
February	-226.5%
March	-328.4%
April	3.3%
May	-2.8e30%
June	-205.4%
July	10.1%
August	14.2%
September	26.7%
October	25.2%
November	23.1%
December	19.7%

Haider Decl. ¶ 9 and Table 1.

As this chart shows, the difference in the monthly overcharge percentages, and hence the average of the 147 monthly overcharge percentages, varies greatly depending solely on which month is chosen as the starting point for her annual cartel indicator variable (or month the dart hits). If the dart hits January (which is the month that Dr. Marx arbitrarily selected as her starting month for the annual cartel indicator variable), the average overcharge is 13.5%.⁶ *Id.* But if the dart hits February, the average “overcharge” is *negative* 226.5%. *Id.* And if the dart hits May, the “overcharge” is negative infinity. The range of the numbers on the dart board is less dramatic for tantalum and film, but it is still very substantial – a range of negative 0.7% to positive 29.0% for tantalum, and 1.9% to 10.0% for film. Haider Decl. ¶ 10 & Tables 2 & 3. In any event, regardless of the range, a reliable overcharge percentage should not depend on throwing darts at all. Saying that the annual overcharge is 13.5% if the annual cartel indicator variable is specified from January-December, while the overcharge is negative infinity if the annual cartel indicator variable is specified from May to April is absurd on its face and is just the kind of “junk science” that Rule 702 excludes. Because Dr. Marx’s testimony depends entirely on her three regression equations, and because those regression equations are undeniably unreliable, her testimony should be excluded.

As the court put it in *Reed Construction Data Inc. v. McGraw-Hill Companies Inc.*, “where, as here, very minor changes in arbitrarily selected model parameters can entirely alter the model’s conclusions, that model is insufficiently robust to withstand the scrutiny of Rule 702.” 49 F. Supp. 3d 385, 407 (S.D.N.Y. 2014), *aff’d*, 638 F. App’x 43 (2d Cir. 2016). The court added:

“[S]ome judgment is called for in any statistical model and, so long as the model is robust with respect to different choices of arbitrary points, there is no pressing issue. But here the choice of the end-date . . . has an outcome-determinative effect.”




Id. See also *Am. Booksellers Ass’n, Inc. v. Barnes & Noble, Inc.*, 135 F. Supp. 2d 1031, 1041-42 (N.D. Cal. 2001) (granting summary judgment where plaintiff’s expert model used “arbitrary” ratios to determine price changes and calculate damages). This is almost precisely the context here. While Dr. Marx’s methodology may be “testable,” it *fails* the tests given the breadth of

⁶ Cohen Decl., Ex. A, p. 55, ¶ 122 and Figure 10.

1 inexplicable variance in results depending on the starting month. *See* Haider Decl. ¶¶ 9-11; *see*
 2 *also* Cohen Decl., Ex. C at 311:5-8 (“If I just make reasonable changes or add reasonable
 3 variables, the results disappear and you can’t rely on them to infer reliability.”). Her regressions
 4 are undeniably unreliable, without basis, and should be excluded.

5 **2. Dr. Marx’s methodology of using a price index as the dependent**
 6 **variable in her regression equations is not generally accepted in the**
 7 **professional economics community and has not been subjected to peer**
 review.

8 In analyzing potential overcharges in a price-fixing case, it is standard is to use the actual
 9 prices charged to the plaintiffs as the dependent variable in a regression equation – *i.e.*, the
 10 variable on the left-hand side of the regression equation. Prowse Decl. ¶ 10. The damages
 11 experts for the other plaintiff groups – Drs. Lamb, Singer, and McClave – all used actual prices
 12 in their regression equations; none constructed a price index as did Dr. Marx. *Id.* The battle
 13 among experts typically comes over which explanatory variables – the variables on the right-
 14 hand side of the regression equation – to include in the model and whether the ones included are
 15 statistically significant.

16 But here, the fatal flaws in Dr. Marx’s model begin on the left-hand side of her equation.
 17 Instead of using the actual prices that the defendants charged the DAPs in her regression
 18 equation, Dr. Marx constructed a price index based on a hypothetical (and always changing)
 19 shopping cart of capacitors sold to all direct purchasers. However, she can point to no support in
 20 the community of professional economists for the usage of a price index instead of actual prices
 21 paid as the dependent variable in regression equations designed to estimate overcharges in a
 22 price fixing case. In fact, Dr. Marx admitted that the methodology she uses has not been
 23 subjected to peer review or publication. Cohen Decl., Ex. B at 24:22-25:1 (“
 24 
 25 ”); *see also id.* at 37:15-38:10. Indeed, the only prior
 26 use of this methodology was by Dr. Marx’s partners in their litigation support firm, Bates White.
 27 *Id.* at 22:20-23:8.
 28

Another court has already excluded under *Daubert* another novel construct that Dr. Marx and her colleagues created, precisely because no one outside of her group had reviewed, let alone endorsed, the construct. *See Anderson News, L.L.C. v. Am. Media, Inc.*, No. 09 Civ. 2227 (PAC), 2015 WL 5003528, at *3 (S.D.N.Y. Aug 20, 2015), *aff'd*, 899 F.3d 87 (2d Cir. 2018), *cert. denied*, 139 S. Ct. 1375 (2019). In *Anderson News*, the court excluded Dr. Marx's construct of "super-plus factors" from which to infer collusion because: "Aside from works written by Dr. Marx and her co-authors, there is no scholarly or legal authority defining or using the term 'super plus factors.' . . . Moreover, the fact that the term has not been adopted or used by anyone other than Dr. Marx and her colleagues indicates that this term has not been generally accepted by the scientific community." *Id.* Like her construct of "super-plus factors" there, Dr. Marx's construct of a monthly price index as her dependent variable here is not based on a generally accepted methodology that has been subjected to peer review or other critique by professionals unrelated to her colleagues at Bates White.

Dr. Marx attempts to deflect attention from the novelty of her approach by citing to scholarly articles that endorse the use of price indices, including Fisher price indices, for certain purposes. Cohen Decl., Ex. A, pp. 49-50 & n.211 & p. 50 n.213; Ex. D, pp. 8-9, ¶ 8 nn.16-17. But Dr. Marx fails to mention that none of those articles endorse the use of price indices for the purpose Dr. Marx uses them for: attempting to measure overcharges in a price-fixing case. Prowse Decl. ¶¶ 5-8.

The absence of support for the use of a price index to measure overcharges due to alleged price-fixing should come as no surprise, considering what an index measures and does not measure. A price index is an aggregate measure of a hypothetical shopping cart of products that no one person or entity actually purchases. A model designed to measure overcharges due to price-fixing, in contrast, has to account for the *actual* prices paid for the products actually purchased by the plaintiffs in question. Given that defendants produced their data regarding their sales to the DAPs, and that the DAPs produced their purchase data, there is no reason to create an index in the first instance. Prowse Decl. ¶ 10. Dr. Marx could have used the actual prices at which the DAPs purchased from defendants on the left-hand side of the regression equation, but

1 simply chose not to. Moreover, the capacitors in the 171 monthly shopping carts from which Dr.
 2 Marx constructed her monthly price indices bear no resemblance to what the DAPs actually
 3 purchased. The DAPs purchased only about █% of the capacitors in Dr. Marx's monthly
 4 shopping carts. Cohen Decl., Ex. B at 21:22-22:9, 45:11-25. Put another way, Dr. Marx is
 5 claiming that the DAPs overpaid each month for a shopping cart of capacitors, but the DAPs did
 6 not even purchase █% of the products in her shopping cart.

7 Indeed, when Dr. Marx's model is applied to the DAPs' actual purchases, the resulting
 8 overcharges are very different from those Dr. Marx calculates. For example, applying Dr.
 9 Marx's model to Avnet's purchases results in negative overcharges for film capacitors, while
 10 aluminum overcharges effectively disappear. Cohen Decl., Ex. E at 425:5-12 ("█
 11 █
 12 █
 13 █").

14 **B. Dr. Marx's model is inadmissible because it imposes an artificial pattern on**
 15 **the monthly overcharges of each year that bears no relation to any of the**
 16 **allegations of how the cartel impacted prices.**

17 Dr. Marx's model is also inadmissible because its result – a series of monthly
 18 overcharges – is mathematically rigged to display a pattern that bears no relation to any of the
 19 allegations of how the cartel impacted prices. In the context of *Daubert*, the “failure to match
 20 the damages model to the theory of antitrust impact renders the expert opinion unfit since it
 21 cannot assist the Court at this point in the litigation in applying the Rule 23 requirements or
 22 *assist the trier of fact later on to determine damages attributable to the purported antitrust*
 23 *violation.” In re Pharmacy Benefit Managers Antitrust Litig.*, Civil Action Nos. 06-1782, 03-
 24 4730, 06-4305, 06-4114, 06-4115, 2017 WL 275398, at *20 (E.D. Pa. Jan. 18, 2017) (emphasis
 25 added); *see also id.* at *19 (“The teaching of *Comcast* is that antitrust plaintiffs must match a
 26 damages model to their theory of liability.”) (citing *Comcast Corp. v. Behrend*, 569 U.S. 27
 27 (2013)); *In re Electronic Books Antitrust Litig.*, Nos. 11 MD 2293 (DLC), 12 Civ. 3394 (DLC),
 28 2014 WL 1282298, at *9-10 (S.D.N.Y. Mar. 28, 2014) (excluding expert opinion showing
 periodic price movements that are not reliably tied to the facts).

Here, Dr. Marx's model is mathematically rigged to produce an artificial pattern in the monthly overcharges that bears no relation to any of the allegations of how the cartel impacted prices. This artificial pattern, inherent in the mathematics embedded in Dr. Marx's model, is that for any given year, the monthly overcharges will either *always* increase month to month, or *always* decreases from month to month.⁷ In other words, if the percentage overcharge increases from January to February in a given year, then the percentage overcharge will continue to increase every remaining month of that year. Likewise, if the percentage overcharge decrease from January to February in a given year, then the percentage overcharge will continue to decrease every remaining month of that year. Prowse Decl. ¶¶ 11-16, and Exhibits 2-4 thereto. The DAPs can point to no allegations, let alone evidence, of an agreement among the defendants to raise prices by a percentage that would continuously increase month over month in a given year, or continuously decrease month over month in a given year. The model "relie[s] on unreasonable assumptions unmoored to the record evidence" and "avoid[s] rigorous analysis" and is therefore inadmissible. *Electronic Books*, 2014 WL 1282298, at *9.

C. Section III of Dr. Marx's report should be excluded because her AVX/KEMET testimony is unsupported by the evidence and her remaining testimony is outside the scope of her expertise and adds nothing to the record.

In addition to Dr. Marx's quantitative analysis, she includes a qualitative analysis in Section III of her report that purportedly supports (1) the reasonableness of the assumption given to her by counsel that there was a cartel among capacitor manufacturers; and (2) the conclusion that the assumed cartel was effective in elevating prices above what they otherwise would have been. Ex. A ¶ 44. But Dr. Marx does not identify or describe any economic methodology she used to actually test the reasonableness of the assumption provided by counsel and Section III does not include evidence Dr. Marx developed or facts of which she has first-hand knowledge.

⁷ This is true for every year for which Dr. Marx's model produces twelve months of overcharges (i.e., 2002-2013), 2001, with only two months of overcharge percentages, and 2014, with only one month of overcharge percentages, are not relevant for this pattern.

1 **1. Dr. Marx cannot testify that AVX and KEMET were part of a**
 2 **conspiracy among capacitor manufacturers.**

3 Dr. Marx admitted that her opinion required that she “[REDACTED]”
 4 [REDACTED]” more than 40
 5 entities identified by the DAP’s counsel. Ex. A ¶ 9. Among the entities on that counsel-supplied
 6 laundry list are AVX and KEMET. Notwithstanding the “assumption” that AVX and KEMET
 7 were part of the alleged cartel with defendants, there is no evidence that permits Dr. Marx to
 8 testify as if AVX and KEMET, in fact, participated in a conspiracy. Indeed, among other things,
 9 Dr. Marx conceded during her deposition that she was not aware of any facts demonstrating that:
 10 (1) AVX attended “group meetings;”⁸ (2) KEMET attended “group meetings;”⁹ (3) other
 11 defendants agreed with KEMET to set prices for capacitors in the United States;¹⁰ or (4) other
 12 defendants agreed with AVX to set prices for capacitors in the United States.¹¹ Dr. Marx also
 13 acknowledged that neither KEMET nor AVX were indicted or entered guilty pleas in connection
 14 with any investigation relating to aluminum, tantalum, or film capacitors.¹²

15 Absent any factual basis on which to opine that Defendants were involved in a cartel for
 16 capacitors with AVX or KEMET, she cannot testify or offer opinions on that matter.¹³ *See*
 17 *Guidroz-Brault v. Mo. Pac. R. Co.*, 254 F.3d 825, 831 (9th Cir. 2001) (excluding expert opinion
 18 where “[t]here was no factual support in the record[.]”).

19 ⁸ Ex. B at 193 (Dr. Marx admits at her deposition that for all of the meetings she identified
 20 she cannot “[REDACTED]”); *see also id.* at 175:1-22 (AVX never attended trade association meetings at issue).

21 ⁹ *Id.* at 223:8-225:21 (Dr. Marx cannot identify any meetings that KEMET attended with
 22 Rubycon); *id.* at 225:23-226:6 (KEMET never attended ATC, MK, or CUP meetings).

23 ¹⁰ *Id.* at 227:18-24 (out of millions of documents produced in discovery, Dr. Marx could only
 24 identify two instances where KEMET was discussed by other defendants at meetings in Japan,
 25 but none where KEMET actually participated).

26 ¹¹ *Id.* at 225:22-226:14, 238:22-239:4.

27 ¹² *Id.* at 190:18-191:12, 238:22-239:4.

28 ¹³ When pressed in deposition, Dr. Marx could do nothing more than vaguely refer to two
 documents that may have reflected some communications between KEMET and one of the
 Defendants. *See id.* at 223-227 (mentioning the “two documents” multiple times). The two
 documents to which Dr. Marx repeatedly refers are minutes of two meetings that AVX and
 KEMET indisputably did not attend. *See* Cohen Decl., Exs. F & G.

2. Dr. Marx cannot offer opinions or testimony purporting to support the existence of a capacitor cartel.

The remainder of Section III merely recites and interprets a cherry-picked set of documents, guilty pleas by certain defendants, and limited testimony. Her stated purpose in this exercise is to “ [REDACTED] ” Ex. A ¶ 44. But this testimony is improper and suffers from at least three substantial flaws:

First, Dr. Marx has no independent knowledge of the facts and has not reviewed the complete record or discovery produced by the parties. Ex. A ¶ 12. Even for the documents Dr. Marx has reviewed and to which she cited, she concedes she did nothing more than read them. Ex B at 229:4-7 (agreeing that all she can do is just “ [REDACTED] ”). Reading documents – which a lay member of the jury can surely do herself – for the purpose of assessing whether a conspiracy existed, is not proper expert opinion, as Dr. Marx knows from her prior case. *Anderson News*, 2015 WL 5003528, at *4 (excluding Dr. Marx’s opinion where there was “no indication that she performed any actual analysis” and her opinions “merely recit[ed] what is on the face of a document produced during discovery”) (citation omitted); *JamSports & Entm’t, LLC v. Paradama Prods., Inc.*, No. 02 C 2298, 2005 WL 14917, at *10 (N.D. Ill. Jan. 3, 2005) (An expert’s “discussion of the question of anticompetitive conduct [based on] his interpretation of correspondence and other evidence . . . has failed to persuade the Court that this is proper testimony by an expert in economics. There is nothing in [the expert’s] expertise that suggests that he is any more competent than the average juror in interpreting these communications or in divining from them the intent of [the defendants]”).

Second, despite her careful choice of words, Dr. Marx’s testimony concerning the “reasonableness” of the assumption provided by the DAPs’ counsel regarding the existence of the conspiracy is tantamount to her testifying directly that the conspiracy exists,¹⁴ which is a

¹⁴ Indeed, despite her claim to the contrary during her deposition (Ex. B at 150:5-7), Dr. Marx’s opinion that the assumption provided by counsel concerning the existence of the cartel is “reasonable” or “plausible” is effectively an opinion in favor of the DAPs on liability, given that

1 legal conclusion. *Mayor & City Council of Baltimore, Md. v. Citigroup, Inc.*, 709 F.3d 129, 135-
 2 36 (2d Cir. 2013) (“The ultimate existence of an ‘agreement’ under antitrust law, however, is a
 3 legal conclusion, not a factual allegation.”).

4 Third, Dr. Marx’s opinions about the “reasonableness” and/or “plausibility” of a
 5 conspiracy are confusing to the jury and unfairly prejudice Defendants. For example, Dr. Marx
 6 claims:

- 7 • The selected meeting minutes “[REDACTED]
 8 [REDACTED]
 9 [REDACTED]” Ex B at 194:24 -
 10 195:9.
- 11 • The selected documents provided her with an “[REDACTED]
 12 [REDACTED]
 13 [REDACTED]” Ex B at 195:17-196:6.

14 The jury cannot reasonably be expected to distinguish between Dr. Marx opining that a
 15 conspiracy among capacitor manufacturers existed versus opining that the assumption that such a
 16 conspiracy existed is reasonable. Instead, the jury will only see an acclaimed Ph.D. economist
 17 testifying that, she came to the conclusion that the conspiracy existed. That question is for the
 18 jury to decide, after being informed by all the admissible evidence and witnesses with personal
 19 knowledge of the facts. *See LinkCo, Inc. v. Fujitsu Ltd.*, No. 00 Civ. 7242 (SAS), 2002 WL
 20 1585551, at *2 (S.D.N.Y. July 16, 2002) (excluding expert testimony based on examination of
 21 documents and deposition transcripts because “testimony by fact witnesses familiar with those
 22 documents would ‘be far more appropriate . . . and renders [the expert witness’s] secondhand
 23 knowledge unnecessary for the edification of the jury.”) (citation omitted); *Ilyia v. Khoury*, 671
 24 F. App’x 510, 511-12 (9th Cir. 2016) (affirming exclusion of expert testimony that “simply
 25 concluded how the jury should find”).

26
 27
 28 the DAPs need only prove at trial the existence of the conspiracy by a preponderance of the
 evidence.

1 **III. CONCLUSION**

2 For the foregoing reasons, Dr. Marx's testimony should be excluded in its
3 entirety.

4 DATED: June 14, 2019

5 Respectfully submitted,

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Pursuant to Local Rule 5-1(i)(3), the filer attests that concurrence
in the filing of this document has been obtained from each of the above signatories.

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Certain Defendants' Notice of Motion and Motion to Exclude testimony of Dr. Leslie M. Marx to be served via CM/ECF on this 14th day of June 2019.

DATED: June 14, 2019

s/ Jonathan M. Jacobson

Jonathan M. Jacobson